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## LITIGATION

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This section addresses the potential that Y2K-related disruptions and delays might trigger a "litigation explosion," as well as the concern that such an explosion might detract from remediation efforts.

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### BACKGROUND AND VULNERABILITIES

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The Committee has always been concerned that a massive amount of litigation might arise as a result of Y2K-related failures. Businesses that are unable to complete remediation, testing, and contingency planning prior to the new year are likely to suffer Y2K-related failures associated with their internal operations and with their business partners, including their suppliers and distributors. Businesses might also suffer Y2K-related failures resulting from disruptions in such critical infrastructures as power generation and telecommunications.

Given the interconnected nature of modern business and our economy, one company's inability to fulfill its business contracts opens it and all the companies that depend upon it to liability. As a result, the Y2K failures of one company can set in motion the unraveling of all of its business partners. As a leading plaintiffs' law firm has stated, "*Among lawyers in*

*the United States, it is widely anticipated that there will be numerous system failures, leading to damages suffered by enterprises, and a concomitant effort to allocate liability—many a litigator's dream scenario.*"<sup>1</sup>

The estimated costs of Y2K-related litigation are staggering—as much as \$1 trillion.<sup>2</sup> The Committee recognizes that if this tremendous amount of capital is diverted to support Y2K litigation, it will be unavailable to build the American economy by funding start-up enterprises, investing in research and development, retaining quality personnel, and expanding into new markets. As a result, the costs of litigation will be spread not just among American businesses, but to all Americans.

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**--SENATOR DODD**

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### WHAT IS BEING DONE?

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Efforts to avoid an onslaught of Y2K-related litigation have been underway at all levels.

#### Federal Efforts

As one of its first tasks, the 106<sup>th</sup> Congress began to explore the possibility of passing legislation to address a Y2K litigation explosion. The Congress viewed such legislation as an effort to avoid the needless diversion of capital into litigation and away from Y2K remediation, and

## INVESTIGATING THE YEAR 2000 PROBLEM: THE 100 DAY REPORT

to minimize the filing of unwarranted lawsuits.

As a result, Y2K liability bills were introduced in both the House and the Senate during the first weeks of the session. On January 6, H.R. 192, the "Year 2000 Consumer Protection Plan Act of 1999" was introduced in the House, and on January 19, the "Y2K Act" was introduced in the Senate. Both pieces of legislation put the issue of a potential Y2K litigation explosion on the table and opened a dialogue between the Congress and a broad coalition of businesses from every industry on how best to approach that issue. In subsequent weeks, additional legislation was introduced as an effort to stem the potential flood of Y2K litigation. The Senate saw the introduction of S. 461, the "Year 2000 Fairness and Responsibility Act," as well as Senator Dodd's S. 1138, the "Y2K Fairness in Litigation Act."<sup>3</sup> The House saw the introduction of H.R. 775, the "Year 2000 Readiness and Responsibility Act."

In conjunction with these bills, the Congress conducted a number of hearings on the potential Y2K litigation explosion. At the Senate Commerce Committee's hearing, Senator Bennett and Senator Dodd shared what they had learned about the Y2K problem as a result of their experience on this Committee, and expressed their concerns about the actual costs to the nation of a massive amount of Y2K-related litigation. Senator Bennett reiterated his concerns at the Senate Judiciary Committee's hearing.

The Committee conducted its own Y2K litigation hearing in March 1999.<sup>4</sup> At that hearing, the Committee heard testimony regarding the negative effects of a litigation spike on the judicial system, in terms of caseload management and the timeframes necessary for lawsuit resolution. The Committee also heard testimony from key Y2K plaintiffs' and defendants' attorneys as to the causes of action that might be brought as a result of Y2K-related failures, and from various sectors of industry that might be affected by the Y2K problem.

After several months of bipartisan effort to craft a balanced bill, and after intensive negotiations with the White House, the House and the Senate overwhelmingly passed the "Y2K Act" on July 1, 1999, and the President signed the bill into law on July 20 (Public Law No. 106-37, 113 Stat. 185, 20 July 1999). Among other things, the Act provides for:

- a 90-day "cure" period during which a potential defendant can resolve a Y2K problem for which it is responsible prior to, and perhaps instead of, the filing of a lawsuit;
- heightened pleading requirements to discourage frivolous litigation;
- a duty to mitigate damages that could have been avoided if readily available information had been utilized;
- a limitation on damages in contract to the damages actually

## INVESTIGATING THE YEAR 2000 PROBLEM: THE 100 DAY REPORT

specified in the contract;

- a cap on punitive damages for individuals and small businesses (50 employees or fewer). The cap is not to exceed the lesser of three times compensatory damages or \$250,000, and the cap does not apply if the defendant acted with specific intent to injure the plaintiff;
- proportionate liability, with some exceptions, which means that a defendant is liable solely for the portion of the judgment that corresponds to its proportional responsibility;
- a requirement that an alleged defect must be a material one for the majority of class members in order for a class action lawsuit to be maintained.

The Act's coverage ends on January 1, 2003.

### State Efforts

Over the past year, almost every state legislature in the nation has considered some form of Y2K liability legislation. To date, more than half of the states have enacted such legislation. The nature of these laws ranges from grants of governmental immunity for Y2K-related disruptions, to narrowly crafted language for specific industries, to broad liability limitations across the board in cases where Y2K-related failures have occurred. A summary of Y2K-related state legislation can be found at <http://www.ita.org/year2000>.

### Industry Efforts

Not content to rely upon legislation, many businesses in every industry have decided to avoid the morass of Y2K litigation by using alternative dispute resolution (ADR). Several ADR programs have been designed specifically with Y2K in mind:

- The Information Technology Association of America (ITAA) has joined with ADR provider JAMS/ENDISPUTE to develop a Y2K/ADR Internet web site for organizations interested in establishing a business strategy to address Y2K disputes. More information can be found at <http://www.ita.org/year2000>.
- The CPR Institute for Dispute Resolution, an alliance of 500 varied global corporations, law firms, and academics, has formed a special panel of neutrals devoted to the Y2K problem. More information can be found at <http://www.cpradr.org/Y2Kinformationpage.htm>.
- The Millennium Accord has brought together a number of leading mediation bodies around the world for the purpose of providing international ADR related to the Y2K problem. More information can be found at <http://www.accord2000.com>.

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### STATUS

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PriceWaterhouseCoopers recently released a report on Y2K litigation.<sup>5</sup> The report concluded that as of

## INVESTIGATING THE YEAR 2000 PROBLEM: THE 100 DAY REPORT

June 30, 1999, there have been 74 Y2K lawsuits filed in the United States. When duplicative lawsuits are pared away, PriceWaterhouseCoopers found 45 unique cases, all filed well before the Year 2000 arrives.

The report broke the lawsuits filed to date into several categories:

- 65% are non-compliant product cases that allege a product defect or possible malfunction. The most commonly alleged causes of action are fraud, breach of implied warranty, deceptive and unfair trade practices, and breach of express warranty.
- 13% are class action shareholder suits. So far, these cases have usually been brought by shareholders suing because a company allegedly made materially false and misleading statements regarding the Y2K compliance of their products or their ability to provide Y2K remediation services. PriceWaterhouseCoopers points out that, in the future, cases brought by shareholders are more likely to result from a company's Y2K problems being publicized, resulting in a decline in the company's stock price.
- 4% are insurance claims.
- 2% concern contractual disputes. These disputes may generate global litigation as a result of the

interconnectedness of the economy with respect to distribution and supply chains.

- 9% concern remediation efforts.
- 7% involve lawsuits against organizations that allegedly did not adequately disclose their Y2K status.

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### EXPECTATIONS

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It is too soon to tell whether the Y2K Act will reduce the number of cases expected to be filed in the next few years. However, as PriceWaterhouseCoopers concludes in its report, should the wave of litigation arrive, three industries appear to be prime targets of Y2K suits: software companies, remediators, and insurance companies. Indeed, a review of the cases filed recently shows a trend toward large corporations filing lawsuits against their insurers to recover the costs of Y2K remediation.

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### CONCERNS

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- The Committee remains concerned about the Y2K-related liability of U.S. corporations that operate internationally. The potential exists for certain countries to utilize their laws to unfairly recoup the costs of Y2K remediation by holding U.S. firms liable for Y2K-related disruptions.

## INVESTIGATING THE YEAR 2000 PROBLEM: THE 100 DAY REPORT

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<sup>1</sup> "Year 2000 Computer Litigation," Michael C. Spencer and Salvatore J. Graziano, at <http://www.milberg.com>.

<sup>2</sup> See "Legal Issues Concerning the Year 2000 Computer Problem: An Awareness Article for the Private Sector," Jeff Jinnett, at <http://www.llgm.com:80/FIRM/article1.htm>; see also "Avoiding a Y2K Lawsuit Frenzy: Insuring Y2K Liability Fairness," Robert D. Atkinson and Joseph M. Ward, at <http://www.dlcppi.org/texts/tech/y2k.htm>.

<sup>3</sup> A companion bill to S. 1138, H.R. 1319, was introduced in the House.

<sup>4</sup> "Y2K in the Courts: Will We Be Capsized by a Wave of Litigation?", S. Hrg. 106-97, Mar. 11, 1999.

<sup>5</sup> The survey can be found at <http://www.pwcy2k.com>.